impossible to determine whether any competitor has a relatively comprehensive network or whether the lines represent numerous providers, each of which have small fragments of coverage. Nor do the maps indicate whether the fiber is actually in a building or how long a lateral connection would be required to actually provide service to the building.

As the Commission found in the *TRRO*, such maps have "little probative value"[65] and their "value ... is undermined by several shortcomings."[66] "Due to the wide variability in market characteristics within an MSA," the Commission found that MSA-wide conclusions based on fiber deployment maps "would substantially over-predict the presence of actual deployment, as well as the potential ability to deploy."[67] Indeed, among other things, maps fail to indicate "the capacity of service ... along the competitive routes identified; if those locations require capacity only at multiple DS3 or higher capacities, and are providing revenues commensurate with those capacities."[68] In addition, maps "do not indicate whether carriers operating the fiber depicted are using these facilities to provide local service or merely interoffice transport, long-distance service, wireless service, or some combination of services other than local exchange service."[69] Further, the Commission expressly has rejected the use of fiber-based collocators as

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[65] *TRRO*, 20 FCC Rcd at 2635-6 ¶ 187.

[66] *Id.*, at 2621 ¶ 158 n.445.

[67] *Id.*, at 2583-4 ¶ 82.

[68] *Id.*, at 2635-6 ¶ 187.

[69] *Id.*, at 2636 ¶ 188.

providing any probative evidence of whether ILECs should be required on an MSA wide basis to offer unbundled access to loops and transport.[70]

Even if the Commission were to accept Qwest's fiber maps as informative, as explained elsewhere in this Opposition, even with this fiber competitive carriers rarely are able to find alternatives to BOC last mile facilities to most customer locations.[71] As the Commission recognizes, even where a carrier has installed a fiber ring, there are limited circumstances where the carrier can install a lateral to a building in order to connect the building to its network.[72] Accordingly, Qwest's maps purporting to show the presence of concerning competitively deployed fiber does not support forbearance.

(b) Qwest Places Too Much Emphasis on Potential Competition

To satisfy the requirements of Section 10 with respect to the "protection of consumers" and to "promote competitive market conditions,"[73] Qwest must be required to show more than that the conditions for *potential* competition exist in a particular market segment. Instead, Qwest must demonstrate — with specificity — the existence of *actual*

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[70] *See TRO*, 18 FCC Rcd at 17182-3 ¶ 341 (observing that the test proposed by Verizon "provides little, if any, indication that even [a collocated] competitor has been able to widely, if at all, self-deploy alternative loop facilities in that area" and that even "the presence of a single [C]LEC's collocated transport facility ... is not sufficient evidence that facilities-based competitive entry into a market ... is economically feasible."); *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶¶ 131-32, 3849, ¶ 341 n.673 (1999).

[71] *See, e.g., Omaha Forbearance Order*, 20 FCC Rcd 19448-9 ¶ 67 (concluding that Qwest was the only provider of wholesale access in MSA demonstrating the lack of alternatives to BOC last mile facilities.).

[72] *TRRO,* 20 FCC Rcd at 2615-20 ¶¶ 149-155.

[73] 47 U.S.C. § 160(a)(2) and (b).

competition — the presence of multiple competitors winning market share and providing services over their own networks.[74] Moreover, it does not follow from the mere fact that one company may be marketing the availability of services to business customers that the business market is indeed competitive.[75] Similarly, a showing of competitive investment in last mile facilities alone is not enough to show competition in a particular market segment and thereby justify forbearance relief under Section 10.[76] Certainly, these factors may constitute evidence that conditions are *promising* for competition to take root — for example because competitors are adding capacity or as a factor in evaluating barriers to entry — but they do not alone constitute specific evidence about the state of current competition in a given market as part of the required statutory analysis particularly where not coupled with other factors that show a market is competitive.

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[74] *Verizon v. FCC*, at 13; *Verizon Six-MSA Order*, 22 FCC Rcd at 21313, ¶ 37. *See also, Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(h)*, Order, 18 FCC Rcd 24648, 24958 ¶ 24 (2003) (stating that in "pursuing relief through the vehicle of forbearance, . . . the Petitioner [has] the obligation to provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards"). *See also Omaha Forbearance Order*, 20 FCC Rcd at 19477, ¶ 64 and n. 177 (specifically finding that Cox had already "captured [a substantial portion] of the residential voice market in the Omaha MSA").

[75] Qwest Petition at 6, 14, 25, 28, 34.

[76] *Id.* at 38-39. This fails to satisfy even the relatively low standard for the "coverage threshold" test employed in the *Omaha Forbearance Order*, wherein it stated that the test would be satisfied by a showing that a competitor "uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings." *Omaha Forbearance Order*, 20 FCC Rcd at 19444, n. 156. As discussed herein, it is also worth noting that the "coverage threshold" test thus relies upon a problematic "predictive judgment" analysis to some degree as well.

Thus, the Commission should make clear in addressing Qwest's latest Petition that it will refrain from considering — and that Qwest and future petitioners are not entitled to rely upon — predictive judgments about *the potential for competition* in a particular market segment or arguments about how other forbearance factors may serve as indicia of potential competition in a particular market segment. Instead, the Commission should clarify that, pursuant to the burden of proof imposed by Section 10, Qwest and any other petitioner seeking forbearance with respect to unbundling obligations must demonstrate *with specificity* the current existence of "robust" actual competition *in each affected market segment* as of the date that the petition is filed.[77]

d. Qwest Fails to Demonstrate Sufficient Competition to Justify Forbearance in the Wholesale Market

The D.C. Circuit determined that the Commission's analysis of facilities-based competition for wholesale customers "played no meaningful role in the FCC's determination"[78] in the *Verizon Six MSA Order*.[79]

Under the more rigorous standard proposed in the Comments included as Attachment A hereto, the Commission should separately and meaningfully consider the state of wholesale competition. While it is theoretically possible that competition sufficient to justify forbearance could exist in a market where there is no wholesale competition, but robust retail competition, that market does not exist in Phoenix.

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[77] *See Anchorage Forbearance Order*, 22 FCC Rcd at 1975, ¶ 28; *see also Verizon Six-MSA Order*, 22 FCC Rcd at 21313 ¶ 37 (noting record evidence demonstrating the "comparatively limited role of the cable operators in serving enterprise customers in these [metropolitan statistical areas] today").

[78] *Verizon v. FCC*, at 14.

[79] *Id.* at 15 (internal citations omitted).

While Qwest attempts to show that some carriers are making wholesale services available to other carriers in portions of the Phoenix MSA, the data Qwest proffers is aggregated at too high a level to be informative of market conditions throughout the Phoenix MSA. For example, to the extent Qwest seeks to introduce evidence that competitors advertise various wholesale services on their website,[80] the Commission has already found that "such evidence lacks the specificity needed to grant forbearance."[81] Qwest also cites to the number of route miles offered by other carriers,[82] and number of lit buildings served by others carriers in the Phoenix MSA.[83] Just as the *TRRO* found the number of route miles, lists of fiber wholesalers, and counts of competitive networks to be unreliable and unsuitable as triggers for the Commission's unbundling rules,[84] the Commission has also found that such data has limits for identifying where any unbundling relief would be warranted or where a competitive carrier might serve a substantial number of buildings within a wire center.[85] Contrary to Qwest's assertions, that various carriers may serve "pockets" of the Phoenix MSA does not provide the Commission with the level of specificity needed to conclude that the wholesale services are ubiquitously

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[80] Brigham Declaration, ¶ 51.

[81] *In the Matter of Petitions of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11758 ¶ 39 n.145 (2008) ("*Qwest 4-MSA Order*").

[82] Brigham Declaration, ¶¶ 53 - 56, 62.

[83] *Id.* ¶¶ 38-39.

[84] *TRRO*, 20 FCC Rcd at 2597, ¶ 110 ("These data are not complete, not representative of the entire industry, not readily confirmable, and aggregated at too high a level to be informative of local market conditions.").

[85] *Qwest 4-MSA Order*, 23 FCC Rcd at11757-8 ¶ 39.

offered throughout the MSA. Moreover, Qwest does not provide any comparative data for the number of buildings with demand for high-capacity services that Qwest serves, and the percentage of commercial buildings reached by wholesale competitors.

Qwest makes no showing that sufficient competition exists to ensure that it will continue to offer loops and transport that competitors may not duplicate at wholesale on terms and conditions that will permit competition. The record must support the conclusion that the ILEC has "very strong market incentives" to continue offering loops and transport on a wholesale basis to competitors on reasonable terms and conditions that would permit competition despite the elimination of UNEs.[86] This very strong incentive will not exist unless there is an independent facilities-based provider of loops that could absorb wholesale customers that would migrate from Qwest's network if Qwest fails to make reasonable wholesale offerings.[87] Without such a competitive showing, and in the absence of a regulatory compulsion, there is no incentive for Qwest to offer its own last mile facilities at competitive rates and terms—as has already been proven in Omaha.[88]

In this case, because Qwest has not alleged, much less shown, significant independent facilities-based wholesale competition for copper, DS0, DS1 and DS3 services, the Commission cannot find that Qwest has strong incentives to make reasonable wholesale offerings. Nor has Qwest attempted to show that the rates, terms and conditions for

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[86] *Omaha Forbearance Order*, 20 FCC Rcd at 19455 ¶ 81; *Anchorage Forbearance Order*, 22 FCC Rcd at 1983-87 ¶¶ 39-42.

[87] *Omaha Forbearance Order*, 20 FCC Rcd at 19455 ¶ 81.

[88] *See* Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No 04-223, at 4-12 (filed July 23, 2007) ("McLeodUSA Petition for Modification").

wholesale services that it offers or intends to offer as substitutes for unbundled network elements, including copper, DS0, DS1 and DS3 loop and transport facilities and dark fiber transport, are just and reasonable and will promote competitive market conditions in the Phoenix MSA.[89]

The Commission's "predictive judgment" in the *Omaha Forbearance Order* that Qwest would make reasonable wholesale offerings in that MSA has proven erroneous and cannot rationally provide any guidance in this proceeding. The Commission should consider UNE forbearance, assuming other requirements are met, only if there is an actual, robustly competitive and ubiquitous wholesale market in existence at the time a Petition is filed and the ILEC demonstrates that its rates and terms for Section 251(c)(3) alternatives are just and reasonable. This approach will eliminate the potential for erroneous predictive judgments and the attendant risk of harming competition.

B. Forbearance Would Harm Competition Because Loop and Transport Unbundling Remains Necessary to Protect Consumers

The Commission has repeatedly found that access to these inputs as UNEs under Sections 251 and 271, particularly UNE loops and transport, is critical to competition. Even Qwest acknowledges that much of the retail competition it relies upon in its request for relief is currently based on the use of UNEs. The Commission has further found that "commercial" offerings of these inputs, in the form of special access services, do not suffice to support robust retail competition. Lastly, the Commission has expressly rejected consideration of the level of retail competition as the predicate for denial of access to UNEs in its Triennial Review proceedings.

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[89] *See* Comments of Access Point *et al.*, WC Docket No. 07-267, at 27-28 (filed March 24, 2008).

1. UNE-Based Competition is Significant in Phoenix

A close look at the data Qwest's submits regarding the level of wireline CLEC competition reveals that a significant number of Qwest's competitors in the Phoenix MSA are actually UNE-based competition. According to Qwest, over ***Begin Confidential End Confidential*** unaffiliated CLECs are currently competing with Qwest for residential customers within the Phoenix MSA.[90] Of these ***Begin Confidential End Confidential***, ***Begin Confidential End Confidential*** are UNE-based, using Qwest's QLSP finished wholesale services, while ***Begin Confidential End Confidential*** were reselling Qwest retail services. Put another way, ***Begin Confidential End Confidential*** of all independent CLECs cited by Qwest in the Phoenix MSA cannot independently provide service to consumers without using Qwest's facilities.

Even Qwest's proclamation that ***Begin Confidential End Confidential*** CLECs are serving residential customers using non-Qwest network facilities is not entirely accurate, as Qwest even admits. Qwest attempts to rectify its intentionally misleading statement in the text of its petition, by deliberately concealing an explanation in the footnotes that "some" of the ***Begin Confidential End Confidential*** CLECs that are purportedly "using non-Qwest network facilities," actually do, in fact, "purchase some UNEs from Qwest."[91] The Commission should not be fooled by Qwest's cheap attempt at obfuscation and see Qwest's data for what it really is – that ***Begin Confidential End Confidential*** of *all* independent CLECs cited by Qwest in the

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[90] Qwest Petition at 23.

[91] *Id.* at 23 n.79.

Phoenix MSA cannot independently provide service to consumers without using Qwest's facilities.

2. Forbearance Would Harm Consumers

Consumers would be harmed by eliminating unbundling requirements because of the significant amount of competitors that rely on Qwest's UNEs in the Phoenix MSA would be forced to pay excessive special access rates instead of TELRIC-based rates and, as a result, the prices for competitive services would increase.

Under Section 10(a)(2) of the forbearance analysis, the Commission must find that access to Section 251(c)(3) loop and transport UNEs is no longer needed to protect consumers in the six MSAs at issue.[92] In the *Omaha Forbearance Order*, the Commission concluded that access to such Section 251(c)(3) UNEs was no longer necessary because existing competition from Cox in the local exchange and exchange access markets, combined with wholesale access rights and other rights CLECs have under Sections 251(c) and 271, were enough to ensure the existence of a competitive market in the Omaha MSA.[93] This decision was based on the Commission's belief that Cox used its own network in competing with Qwest and did not "rely[] on Qwest's loops and transport."[94] While the record associated with the *Anchorage Forbearance Order* indicated

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[92] 47 U.S.C. § 160(a)(2).

[93] *Omaha Forbearance Order*, 20 FCC Rcd at 19452, 19453 ¶ 71 & 73; *see also Anchorage Forbearance Order*, 22 FCC Rcd at 1990 ¶ 48 (finding that the "251(c)(3) access obligation for UNE loop and transport elements and section 252(d)(1) pricing obligation is no longer necessary to protect consumers [in five wire centers] in part because sufficient alternative facilities and facilities access obligations exist to ensure competitive market conditions.").

[94] *Omaha Forbearance Order*, 20 FCC Rcd at 19453 ¶ 73.

that GCI did rely on ACS for UNEs,[95] the Commission's decision was heavily based on GCI's "announced plans to convert its local exchange service customer base to its own facilities" and the Commission's finding that GCI "credibly demonstrated that it perceives financial and business incentives to reduce as fast as possible its dependence on ACS-provided UNE loops."[96] Because these orders relied heavily on this evidence in concluding that Section 10(a)(2) was satisfied, the Commission should not grant Qwest's request for forbearance from § 251(c)(3) loop and transport unbundling here because there is no similar evidence that competitors are using their own networks to compete or have "credibly demonstrated" their plans to do so.[97] Even if Qwest provided such evidence, forbearance would not be appropriate because competitors continue to rely heavily on Qwest's facilities. Hence, the continued availability of § 251(c)(3) loop and transport facilities in the Phoenix MSA at issue remains necessary to promote and protect competition in these markets, ensure customers in each of them have, and continue to have, competitive choices. Thus, Qwest cannot demonstrate that Section 10(a)(2) is satisfied.

3. Forbearance Would Create a New Barrier to Entry

a. CLECs are Impaired in Phoenix Without Unbundled Access to UNEs Because of Higher Costs and Lower Margins

Past Commission orders have first determined whether a requesting carrier is impaired without access to an element of the ILEC's network *at any price.*[98] If impairment

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[95] *Anchorage Forbearance Order*, 20 FCC Rcd at 1976-7 ¶ 30.

[96] *Id.* at 1975 ¶ 28 n.84, 1981 ¶ 38 n.118.

[97] *Id.* at 1981 ¶ 38 n.118.

[98] Even the *USTA II* court agreed that price is not a factor. "The question is ... what the relevant benchmark is for assessing whether entry is "impaired" if non-ILECs

is found, then that element must be unbundled at cost-based rates pursuant to Section 252(d)(1).[99] This ordering is accordance with the Act, which prescribes an "if impairment – then TELRIC" analysis. The Act instructs the Commission to require unbundling of network elements where "*the failure to provide access* would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[100] Where competitors are impaired *without any access to the ILEC networks*, then in order to drive down retail telecommunications prices toward actual cost, Congress intended competitors to be assured such access at cost-based rates [*i.e.* TELRIC]."[101] Only this formula can assure that, where competition relies on access to the legacy incumbent networks, the prices paid by *consumers* do not remain inflated as a result of incumbent pricing (whether retail or wholesale) that does not reflect the incumbent's actual ongoing costs.

C. Forbearance Would Not Serve the Public Interest

Under the third prong of the forbearance analysis, Section 10(a)(3), the Commission should conclude that competitive access to Section 251(c)(3) loop and transport

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don't have access to UNEs (*at whatever rate the Commission might choose to prescribe*)." (emphasis supplied). *USTA II,* 359 F.3d at 577.

[99] As Commissioner Copps stated, "impairment is the touchstone of our unbundling policy under Section 251. It triggers a very specific pricing obligation. All elements unbundled pursuant to Section 251 must be made available to competitors at cost plus a reasonable profit." Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783, 16827-8, Separate Statement of Commissioner Copps (2004)

[100] 47 U.S.C. § 251(d)(2)(B) (emphasis added).

[101] 47 U.S.C. § 252(d)(1).

UNEs in the Phoenix MSA remains vital to the public interest.[102] Section 10(b) states that before arriving at a contrary conclusion as Qwest asks, the Commission must find that the requested forbearance "will enhance [and] ... promote competition among providers of telecommunications services."[103]

In the *Omaha Forbearance Order*, the Commission concluded that "granting Qwest relief from its loop and transport unbundling obligations in parts of the Omaha MSA will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by Section 10(b)."[104] It further held that "the costs of unbundling obligations in parts of the Omaha MSA outweigh the benefits."[105] The Commission explained that forbearance in Omaha was in the public interest because regulatory intervention results in reduced incentives to innovate and invest in facilities as well as creating the complex regulations governing the sharing of facilities.[106] It stated that the high degree of regulatory intervention required by the Telecommunications Act of 1996 to generate competition is no longer justified where "local exchange markets are sufficiently competitive," such as in the nine Omaha wire centers where Qwest was granted forbearance, and that forbearance would also serve the

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[102] 47 U.S.C. § 160(a)(2).

[103] *Id.* at § 160(b).

[104] *Omaha Forbearance Order*, 20 FCC Rcd at 19453 ¶ 75.

[105] *Id.*, at 19454 ¶ 76.

[106] *Id.*

public interest by increasing regulatory parity in the Omaha telecommunications services market.[107]

In the *Anchorage Forbearance Order*, the Commission concluded that relieving ACS from the Section 251(c)(3) access obligations and Section 252(d)(1) pricing obligations for loop and transport elements, subject to the condition it adopted, was in the public interest under Section 10(a)(3).[108] It explained that the factors upon which its conclusions under Sections 10(a)(1) and (2) were based also convinced it that this relief will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by Section 10(b).[109]

Even if these determinations were valid, the same cannot be said of the Phoenix MSA. As shown below, Qwest's forbearance request fails to meet the Section 10(a)(3) public interest standard under the Commission's standards set forth in the *Omaha* and *Anchorage Forbearance Orders.*

First, the Section 10(a)(1) considerations discussed above demonstrate that Qwest's request for unbundling relief is not in the public interest. Second, as shown in Section III.A.1.b above, granting Qwest's request will not enhance [and] ... promote competition among providers of telecommunications services" as Section 10(b) requires.[110]

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[107] *Id.*, at 19454-5 ¶ 78.

[108] *Anchorage Forbearance Order*, 22 FCC Rcd at 1991 ¶ 49.

[109] *Id.*

[110] 47 U.S.C. § 160(b).

Third, there is no evidence that Qwest's competitors have facilities that cover a percentage of the end user locations accessible from each of the wire centers in the Phoenix MSA comparable to the market shares the Commission used as competitive thresholds in the *Omaha* and *Anchorage Forbearance Orders*.[111] The Commission has emphasized that the public interest in establishing regulatory parity between competitive carriers and ILECs is *not* served until "the benefits of competition are sufficiently realized and competitive carriers have constructed their own last mile facilities and their own transport facilities."[112] Qwest has not satisfied this evidentiary burden and, as demonstrated above, it still remains the dominant provider of business and residential telecommunications services. Nor has Qwest shown that competitive wireline loop and transport facilities to end users ubiquitously exists throughout each of the Phoenix MSAs.[113] Because adequate competitive facilities-based alternatives to Qwest's bottleneck facilities have not developed in the Phoenix MSA, it would not be in the public interest to grant Qwest's forbearance petition as to § 251(c)(3) unbundling.

In the *Omaha Forbearance Order*, the Commission made a "predictive judgment" that Qwest would not strand competitive investments by curtailing access to its analog,

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[111] *Omaha Forbearance Order*, 20 FCC Rcd at 19450-1 ¶ 69; *see also Anchorage Forbearance Order*, 22 FCC Rcd at 1977 ¶ 31.

[112] *Omaha Forbearance Order*, 20 FCC Rcd at 19454-5 ¶ 78; *see also Anchorage Forbearance Order*, 22 FCC Rcd at 1975-6 ¶ 28.

[113] Furthermore, for the reasons stated in section IV.C above, intermodal competition from VoIP and Wireless providers are not substitutes for wireline services. For this reason, the Commission should not consider wireless or VoIP competition in determining whether Qwest's requested forbearance relief is in the public interest.

DS-0, DS-1, or DS-3-capacity facilities.[114] It postulated that Cox's ability to absorb customers onto its proprietary network would supply enough competitive pressure to force Qwest to "maximize use of its existing local exchange network, providing service at retail *and at wholesale*."[115] The Commission predicted this because Cox had its own loops and transport connected to a certain percentage of Qwest's end-users in the nine wire centers in Omaha, and thus the potential existed that Cox would absorb customers into its proprietary network. The Commission made similar findings in the *Anchorage Forbearance Order* with respect to the five wire centers where forbearance relief was granted.[116] However, as noted throughout this Opposition, unlike Omaha and ACS, Qwest has not attempted to demonstrate that its competitors have facilities deployed to a substantial portion of the end users throughout each of the wire centers in the Phoenix MSA and can absorb customers without any reliance on Qwest's facilities. Lacking such evidence, the Commission cannot conclude that Qwest would face similar competitive pressure and thus there is no reason to believe Qwest will not curtail competitive access to its facilities.

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[114] *Omaha Forbearance Order*, 20 FCC Rcd at 19455 ¶ 80.

[115] *Id.*, at 19455 ¶ 81.

[116] *See Anchorage Forbearance Order*, 22 FCC Rcd at 1988, 1991 ¶¶ 44 & 49. The Commission emphasized that given "GCI's increasing ability to absorb customers over its own last-mile facilities, ACS will be subject to very strong market incentives to ensure that its network is used to optimal capacity – irrespective of any legal mandate that it do so." *Id.*, at 1991 ¶ 49. "Faced with aggressive 'off-net' competition from GCI," the Commission predicted that "ACS will endeavor to maximize use of its existing local exchange network, providing service at retail and at wholesale, in order to minimize revenue losses resulting from customer defections to GCI's service." *Id.*

Similarly, it would be a mistake for the Commission to conclude that Qwest's existing obligations to offer special access or Section 271 loop and transport facilities are sufficient alternatives to Section 251(c)(3) facilities. The Commission's prediction to that effect in Omaha has been proven wrong by experience.[117] Further, market pressures in the Phoenix MSA have not forced Qwest to reduce its special access rates; rather, it has increased them. The simple fact is that Section 251(c)(3) loop and transport forbearance will harm competition in any MSAs where Qwest seeks it. Qwest has failed to satisfy the standards set in the *Omaha Forbearance Order*, much less demonstrate that forbearance "will enhance [and] ... promote competition among providers of telecommunications services."[118] Rather, removing Qwest's unbundling obligations will thwart competition by forcing competitive carriers with no other options to purchase loops and transport at above-market prices. This will undermine their ability to compete, which runs contrary to the public interest standard.

Furthermore, a duopoly is not sufficient justification to grant Qwest's Petition and does not meet the requirements of Section 10(a). Absent compliance with the market opening provisions of the Act, it would not be in the public interest to substantially deregulate incumbent LECs because there would be no assurance that they could not

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[117] *See* McLeodUSA Petition for Modification; *see also* Letter from Chris MacFarland, Group Vice President - Chief Technology Officer, McLeodUSA, to Marlene Dortch, Secretary, FCC, WC Docket 05-281 (filed Dec. 15, 2006) (explaining that because forbearance granted by the FCC in the Omaha Market has made it extremely difficult for McLeodUSA to remain in the Omaha market and has severely devalued the investment in its network facilities in the market, McLeodUSA "will either sell or cease its operations in the market, despite its enormous investment in its own network and facilities").

[118] 47 U.S.C. § 160(b).

engage in conduct that would thwart competition, such as by denying competitors access to bottleneck facilities. Accordingly, the Commission must deny Qwest's request for forbearance.

1. The Experience of Omaha Shows that Qwest Will Not Offer Reasonable Terms and Conditions for Wholesale Service

Events in Omaha since 2005 vividly illustrate the consequences of "life after forbearance." In the time since the Commission lifted Qwest's Section 251(c)(3) unbundling obligations in the Omaha MSA, Qwest has proposed uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers.

As the most impacted CLEC in the Omaha market, McLeodUSA has made it clear that the forbearance granted to Qwest in the Omaha market has made it extremely difficult for McLeodUSA to remain viable in that market and has severely devalued the investment in its network facilities.[119] Qwest's conduct in the post-forbearance Omaha market plainly contravenes the Commission's prediction that "market incentives" would motivate Qwest to continue to make reasonable wholesale offerings of loops and transport available to competitors notwithstanding forbearance from Section 251(c) UNE obligations.[120] Qwest has likewise failed to comply with its obligation to offer "just and

[119] McLeodUSA has submitted extensive analyses to the Commission regarding Qwest's failure to offer just and reasonable post-forbearance offerings in the Omaha MSA. In the interest of brevity, those previously filed analyses are incorporated herein by reference. *See, e.g.,* McLeodUSA Petition for Modification; *see also* Letter from Chris MacFarland, Group Vice President and Chief Technology Officer, McLeodUSA Telecommunications Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-281 (filed Dec. 15, 2006).

[120] *See Omaha Forbearance Order*, 20 FCC Rcd at 19456 ¶ 83.

reasonable prices" to competitors under Section 271. Rather than having incentives to set prices at competitive levels, Qwest has been very opportunistic in its pricing decisions in the absence of Section 251(c) obligations and has taken advantage of the fact that it is the only wholesale loop provider in Omaha. With respect to McLeodUSA, Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers. Instead, Qwest has only offered to replace high-capacity UNEs with special access services from its FCC Tariff No. 1, at vastly higher rates for both recurring and non-recurring charges.[121] Qwest proposes to offer stand alone DS0 loops at rates that are nearly 30% higher than what the identical network facilities could be purchased for if available as UNEs.[122]

With regard to DS1 and DS3 loops, Qwest has offered to "discount" its tariffed special access rates in the context of a "Regional Commitment Program" ("RCP") offering, but only if McLeodUSA binds itself, and is able to comply with, term and volume commitments for obtaining such facilities.[123] Because the RCP is footprint-wide, it extends outside of the nine wire centers affected by the *Omaha Forbearance Order* and in areas where McLeodUSA is legally entitled to obtain such facilities as UNEs at significantly more economical cost-based rates. The scope of Qwest's bundled offer is, therefore, excessive, and it is apparent that, absent any relief from the Commission,

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[121] McLeodUSA Petition for Modification, Declaration of Don Eben, McLeodUSA Telecommunications Services, Inc., ¶ 5 ("Eben Declaration").

[122] It is also noteworthy that McLeodUSA has approached Cox on at least two occasions regarding its willingness to entertain a commercial arrangement for McLeodUSA to lease from Cox last mile network facilities. McLeodUSA was rebuffed on both occasions. *See* McLeodUSA December 2006 Letter at 2.

[123] McLeodUSA Petition for Modification, Eben Declaration, ¶¶ 10-11.

McLeodUSA will be forced to replace the loops and transport formerly available as UNEs by leasing such facilities from Qwest at a combination of prohibitive special access rates and premium DS0 "commercial" rates.

McLeodUSA's repeated good faith attempts to negotiate wholesale replacement arrangements for loops and transport with Qwest following release of the *Omaha Forbearance Order* have been met with Qwest's steadfast refusal to negotiate any wholesale pricing for the affected wire centers that deviates from its special access and RCP pricing. Qwest is exercising monopoly power by refusing to change its position on key points since it knows McLeodUSA has no alternative supplier of network elements. There simply is no market force constraining Qwest from offering a "take it or leave it" proposal. Of course, forcing competitive carriers out of the market means that those carriers' customers will be forced to go back to Qwest, thereby increasing the margin Qwest will realize from directly serving these end users.[124]

While Qwest has made commercial pricing for DS0 loops available for some time in Omaha, a review of the associated agreement reveals numerous unacceptable and onerous terms. For example, Qwest has priced the commercial two-wire DS0 loop rates nearly 30% higher than TELRIC rates, and has specifically excluded all wholesale performance standards from Qwest's service offering, including Section 271 performance

[124] While it may be true that residential customers may choose to switch to Cox, *see Omaha Forbearance Order*, 20 FCC Rcd at 19448 ¶ 66, business customers, and in particular, small and medium sized customers served with T1 services, will not have a choice of facilities-based providers unless Cox is directly connected to each affected customer's premise with their own connection. The evidence in the Omaha docket did not indicate that Cox had actual connections to each business customer location, but only that Cox's network passed by in certain wire centers.

metrics.[125] Moreover, the commercial pricing for stand alone DS0 loops confirms the anticompetitive nature of Qwest's wholesale pricing. Qwest offers CLECs a lower-cost DS0 loop if the CLEC combines that loop with Qwest local switching. The identical loop facility is nearly 30% more expensive when purchased without Qwest local switching attached. Clearly, there is no cost justification for the significantly higher price point. Qwest is merely able to extract a 30% monopoly premium for the standalone DS0 loop since CLECs have no alternative. There is no "market incentive" since Qwest has no competition in the wholesale market for DS0 loops. This price discrimination is wholly inconsistent with the Commission's prediction that Qwest would offer network facilities at competitive rates for use in conjunction with a "competitor's own services and facilities."[126] Qwest's price discrimination appears to be intentionally designed to drive facilities-based competitors out of the market.

Another egregious illustration of Qwest's refusal to negotiate wholesale pricing involves the exorbitant non-recurring charges ("NRCs") that it seeks to impose for high capacity circuits. For example, to install a UNE DS1 loop and cross connect in Nebraska, the cost-based NRC is $136.15.[127] For the Omaha MSA central offices where it has

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[125] *See* McLeodUSA Petition for Modification, Eben Declaration, ¶¶ 20, 24-25, and Exhibit 3, at 43-70 of 70 (Qwest's DS0 Loop Facility offering is attached to the MSA as Service Exhibit 1). According to Qwest's website, only one CLEC (TCG Omaha) has executed what appears to be Qwest's template agreement. *See* http://www.qwest.com/wholesale/clecs/commercialagreements.html.

[126] *Omaha Forbearance Order*, 20 FCC Rcd at 19456 ¶ 83.

[127] McLeodUSA Petition for Modification, Eben Declaration, ¶ 27.

pricing flexibility, Qwest has set the NRC at $626.50.[128] That amounts to a 360% increase in NRCs that has resulted from the grant of forbearance.

Monthly recurring charges ("MRCs") also increase significantly in the forbearance wire centers. UNE DS1 loops in Zone 1 increase from $76.42 to a "price flex" rate of $182.22, a 138% increase.[129] The prospect of these enormous cost increases have already led McLeodUSA to significantly limit its Omaha operations. CLECs simply cannot be viable carriers in Omaha unless the wholesale pricing regime is significantly modified.[130]

Qwest's persistent refusal to negotiate wholesale rates following the *Omaha Forbearance Order* contravenes not only the Commission's predictive judgment regarding

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[128] Qwest has been granted pricing flexibility in all nine Omaha wire centers affected by the forbearance. *See Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, 17 FCC Rcd 7363 (WCB Apr. 24, 2002) (granting Qwest Phase II pricing flexibility in the Omaha MSA, among other MSAs). This has permitted Qwest to *increase* its pricing for high capacity circuits. *See* McLeodUSA Petition for Modification, Eben Declaration, ¶ 9. It therefore appears that Qwest's response to the grant of special access pricing deregulation was a better indicator of what Qwest would do once Section 251(c) UNEs were eliminated.

[129] McLeodUSA Petition for Modification, Eben Declaration, ¶ 6.

[130] To date, Qwest has continued to invoice McLeodUSA in the affected Omaha wire centers at UNE pricing. However, it is Qwest's position that it is entitled to re-rate all network elements in the affected wire centers to the March 2006 effective date of the *Omaha Order* and backbill McLeodUSA. Accordingly, for planning and financial purposes, McLeodUSA has had to operate as if the higher costs resulting from the loss of UNEs are already in effect. McLeodUSA is particularly disadvantaged because, in contrast to the *Anchorage Forbearance Order*, where the Commission's grant of forbearance was conditioned on ACS's continued provision of local "legacy" loops pursuant to the existing rates, terms and conditions between ACS and GCI in Fairbanks, Alaska, until such time as commercial agreements were concluded, the *Omaha Order* contains no affirmative steps to establish interim pricing pending the negotiation of commercial replacement arrangements. *See Anchorage Forbearance Order*, 22 FCC Rcd at 1983-7 ¶¶ 39-42.

Qwest's conduct once forbearance was granted for Section 251(c)(3) loops and transport, but its Section 271 obligation to provide wholesale access to local loops, transport, and other network elements "at just and reasonable prices."[131] Because the Commission's predictive judgment was premised in part on Qwest's compliance with Section 271 pricing requirements, Qwest's flouting of this obligation provides further reason for the Commission to deny forbearance in any other MSA at this time.

Given all of this, there is no foundation for a "predictive judgment" that CLECs would be able to obtain competitive prices for wholesale access in a forborne environment. The necessity for, and the benefit of maintaining Qwest's UNE obligations is patent – it provides for robust competition in a given market. The predictive judgment of competitive prices in the *Omaha Forbearance Order* was little more than wishful thinking and speculation. The Commission should avoid the same error in connection with Qwest's latest Petition.

D. Forbearance Would be Unlawful

Section 10(d) provides that "the Commission may not forbear from applying the requirements of section 251(c) or 271 ... until it determines that those requirements have been fully implemented."[132] Although the *Omaha Forbearance Order* found that this requirement was satisfied, it relied on a patently unreasonable interpretation of the statute that was inconsistent with past Commission rulings, and without explaining the inconsistency. Its ruling that "fully implemented" means no more than initial rulemaking contradicted previous statements that saw the adoption of unbundling rules as the beginning,

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[131] *Omaha Forbearance Order*, 20 FCC Rcd at 19466-7 ¶ 103.

[132] 47 U.S.C. §160(d).

not the end, of implementation of Section 251(c).[133] In fact, when the Commission initially adopted its Section 251(c) rules in the *Local Competition Order*, it explained that these rules are merely "the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252."[134] The *Omaha Forbearance Order* ignored these previous findings and failed to explain its reason for abandoning precedent.[135] It should not repeat this mistake by granting Qwest's Petition based on the *Omaha Forbearance Order* definition of "fully implemented."[136]

Although this issue was raised in the appeal of the *Omaha Forbearance Order*, the D.C. Circuit declined to rule on the inconsistency between the Commission's current interpretation of Section 251(c) and the Commission's prior rulings because the Commission never had an "opportunity to pass" on these arguments.[137] Since the arguments are

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[133] *See* Opposition of ACN *et al.*, WC Docket No. 06-172, at 52-58 (filed Mar. 5, 2007) ("March 5, 2007 Opposition of ACN *et al.*, Docket No. 06-172").

[134] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order 11 FCC Rcd 15499, ¶ 6 (1996) (emphasis added) ("*Local Competition Order*"). The Commission found that Section 251 involves an "allocation of responsibilities" between itself and the states. *Id.*, at 15520 ¶ 41. Both the Commission and the states administer the Commission's rules and the states perform other critically important functions pursuant to Section 251. *Id.*, at 15527 ¶ 53.

[135] *See AT&T v. FCC*, 236 F.3d 729, 734 (D.C. Cir. 2001). The finding of *USTA II* that the FCC in its *TRO* had unlawfully delegated authority to the states to establish, pursuant to Section 251(d)(2), unbundling standards does not invalidate the FCC's view in the *Local Competition Order* that, under the Act, states play a key role, such as through setting prices and conducting arbitrations, in implementing Section 251(c).

[136] Other arguments demonstrating why the Commission's interpretation of "fully implemented" in the *Omaha Forbearance Order* was unlawful are set forth in the attached March 5, 2007 Opposition of ACN *et al.* and are incorporated herein by reference. *See* March 5, 2007 Opposition of ACN *et al.*, WC Docket No. 06-172, at 53-58.

[137] *Qwest*, 482 F.3d at 478.

now squarely presented, the Commission must revisit its ruling in the *Omaha Forbearance Order* and establish a definition of "fully implemented" that is consistent with its view expressed in the *Local Competition Order*, or provide a complete justification for reversing course.[138]

The *Omaha Forbearance Order* also improperly decoupled Section 10 forbearance from Section 251(d)(2) impairment,[139] and, while noting that Qwest still remains obligated to make special access, § 271 and § 251(c)(4) resale offerings available, it failed to consider the significant open proceedings before the Commission that are addressing problems with these non-UNE offerings.[140] The Commission should not repeat the same mistakes in addressing Qwest's Petition.

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[138] *Columbia Broad. Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (FCC must explain its reasons for reversing its course; enumerate factual differences between similar cases; and explain the relevance of those differences to the purposes of the Act); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977).

[139] Rather than repeat those arguments, they are incorporated by reference. *See* March 5, 2007 Opposition of ACN *et al.*, WC Docket No. 06-172, at 49-51.

[140] *Id.* at 58-66.

IV. CONCLUSION

For the foregoing reasons, Qwest's Petition for Forbearance should be denied.

/s/

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